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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 DAVID A. JONES,)
7 Plaintiff,) No. CV-08-00222-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on April 3, 2009. (Ct. Rec. 14,
15 17). Attorney Maureen J. Rosette represents Plaintiff; Special
16 Assistant United States Attorney Leisa A. Wolf represents the
17 Commissioner of Social Security ("Commissioner"). The parties
18 have consented to proceed before a magistrate judge. (Ct. Rec. 7.)
19 After reviewing the administrative record and the briefs filed by
20 the parties, the court **GRANTS** Defendant's Motion for Summary
21 Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary
22 Judgment (Ct. Rec. 14).

23 **JURISDICTION**

24 Plaintiff protectively filed an application for disability
25 insurance benefits (DIB) and filed an application for supplemental
26 security income (SSI) (applications for disability benefit
27 expedited reinstatement) in October of 2004 alleging major
28

1 depression, adult attention deficit disorder (ADD), and a learning
2 disability. (Tr. 50-58.) Both applications allege onset as of
3 February 16, 2004. (Tr. 17, 59.) The applications were denied
4 initially and on reconsideration. (Tr. 39-40, 42-45.) Plaintiff
5 had previously been awarded DIB from May of 1989 until May of
6 2004. (Tr. 17.)

7 At a hearing before Administrative Law Judge (ALJ), Richard
8 A. Say on October 17, 2006, plaintiff, represented by counsel, and
9 vocational expert Dan McKinney testified. (Tr. 373-396.) On
10 December 1, 2006, the ALJ issued an unfavorable decision. (Tr.
11 17-26.) The Appeals Council received additional evidence and
12 denied a request for review on June 2, 2008. (Tr. 6-9.)
13 Therefore, the ALJ's decision became the final decision of the
14 Commissioner, which is appealable to the district court pursuant
15 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
16 review pursuant to 42 U.S.C. § 405(g) on July 14, 2008. (Ct. Rec.
17 1, 4.)

18 **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing
20 transcripts, the ALJ's decision, the briefs of both Plaintiff and
21 the Commissioner, and are summarized here.

22 Plaintiff was 37 years old at onset and 40 at the time of the
23 hearing. (Tr. 25, 377.) He has a high school education and took
24 special education classes. (Tr. 377.) Plaintiff has worked as a
25 janitor and dishwasher. (Tr. 64, 120, 222.) He indicated he was
26 previously found disabled due to major depression but benefits
27 were terminated in May of 2004. (Tr. 378.) Benefits were
28 terminated due to work activity. (Tr. 17, 379.) Plaintiff

1 testified that he worked from about 1999 to 2004 as a dishwasher
2 for six months and then as a janitor. (Tr. 379.) His last
3 janitorial job lasted about three years. (Id.) Plaintiff stopped
4 working at his last job due to trouble dealing with coworkers and
5 chemicals irritated his lungs. (Tr. 380.) The current claim is
6 based on depression and ADD. (Id.) In a typical day, plaintiff
7 testified he sits in a chair and sleeps; occasionally he vacuums
8 and cooks. His hobbies include camping and fishing. (Tr. 381,
9 383.) Plaintiff can sit and stand for an hour before needing to
10 change position due to restless leg syndrome and arthritis in his
11 ankles, kneecaps and shoulders. (Tr. 384.) Walking is limited to
12 three blocks because he becomes "winded." (Tr. 384-385.)
13 Plaintiff has had headaches at a rate of 2-3 per month for about a
14 year and a half. (Tr. 386.) Plaintiff complained of depression
15 and memory problems. (Tr. 387.) Medication side effects cause
16 his hands to shake, making it difficult to hold objects, but
17 plaintiff does not know which medications cause this. (Tr. 388.)
18 He sleeps 2-3 times daily for 1-2 hours. (Tr. 389.)

19 SEQUENTIAL EVALUATION PROCESS

20 The Social Security Act (the "Act") defines "disability"
21 as the "inability to engage in any substantial gainful activity by
22 reason of any medically determinable physical or mental impairment
23 which can be expected to result in death or which has lasted or
24 can be expected to last for a continuous period of not less than
25 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
26 Act also provides that a Plaintiff shall be determined to be under
27 a disability only if any impairments are of such severity that a
28 plaintiff is not only unable to do previous work but cannot,

1 considering plaintiff's age, education and work experiences,
2 engage in any other substantial gainful work which exists in the
3 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
4 Thus, the definition of disability consists of both medical and
5 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
6 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled.
9 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
10 is engaged in substantial gainful activities. If so, benefits are
11 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
12 not, the decision maker proceeds to step two, which determines
13 whether plaintiff has a medically severe impairment or combination
14 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
15 416.920(a)(4)(ii).

16 If plaintiff does not have a severe impairment or combination
17 of impairments, the disability claim is denied. If the impairment
18 is severe, the evaluation proceeds to the third step, which
19 compares plaintiff's impairment with a number of listed
20 impairments acknowledged by the Commissioner to be so severe as to
21 preclude substantial gainful activity. 20 C.F.R. §§
22 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
23 App. 1. If the impairment meets or equals one of the listed
24 impairments, plaintiff is conclusively presumed to be disabled.
25 If the impairment is not one conclusively presumed to be
26 disabling, the evaluation proceeds to the fourth step, which
27 determines whether the impairment prevents plaintiff from
28 performing work which was performed in the past. If a plaintiff

1 is able to perform previous work, that Plaintiff is deemed not
2 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
3 At this step, plaintiff's residual functional capacity ("RFC")
4 assessment is considered. If plaintiff cannot perform this work,
5 the fifth and final step in the process determines whether
6 plaintiff is able to perform other work in the national economy in
7 view of plaintiff's residual functional capacity, age, education
8 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon plaintiff to establish
11 a *prima facie* case of entitlement to disability benefits.
12 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
13 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
14 met once plaintiff establishes that a physical or mental
15 impairment prevents the performance of previous work. The burden
16 then shifts, at step five, to the Commissioner to show that (1)
17 plaintiff can perform other substantial gainful activity and (2) a
18 "significant number of jobs exist in the national economy" which
19 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
20 Cir. 1984).

21 STANDARD OF REVIEW

22 Congress has provided a limited scope of judicial review of a
23 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
24 the Commissioner's decision, made through an ALJ, when the
25 determination is not based on legal error and is supported by
26 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
27 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
28 1999). "The [Commissioner's] determination that a plaintiff is

1 not disabled will be upheld if the findings of fact are supported
2 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
3 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
4 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
5 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
6 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
7 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
8 573, 576 (9th Cir. 1988). Substantial evidence "means such
9 evidence as a reasonable mind might accept as adequate to support
10 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
11 (citations omitted). "[S]uch inferences and conclusions as the
12 [Commissioner] may reasonably draw from the evidence" will also be
13 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
14 On review, the Court considers the record as a whole, not just the
15 evidence supporting the decision of the Commissioner. *Weetman v.*
16 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
17 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to
19 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
20 evidence supports more than one rational interpretation, the Court
21 may not substitute its judgment for that of the Commissioner.
22 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
23 (9th Cir. 1984). Nevertheless, a decision supported by
24 substantial evidence will still be set aside if the proper legal
25 standards were not applied in weighing the evidence and making the
26 decision. *Browner v. Secretary of Health and Human Services*, 839
27 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
28 evidence to support the administrative findings, or if there is

1 conflicting evidence that will support a finding of either
2 disability or nondisability, the finding of the Commissioner is
3 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
4 1987).

5 **ALJ'S FINDINGS**

6 At the outset, the ALJ found plaintiff met the DIB
7 requirements through August 31, 2004. (Tr. 17, 19.) The ALJ
8 elected not to reopen the prior application and determined that
9 the relevant dates are February 16, 2004 (onset) through December
10 1, 2006 (decision). (Tr. 17-18.) The ALJ found at step one that
11 although plaintiff earned some income after onset, he has not
12 engaged in substantial gainful activity. (Tr. 19.) At steps two
13 and three, the ALJ found that plaintiff suffers from depression,
14 attention deficit disorder (ADD), borderline intellectual
15 functioning, and chemical sensitivity, impairments that are severe
16 but which do not alone or in combination meet or medically equal a
17 Listing impairment. (Tr. 20-21.) The ALJ found plaintiff less
18 than completely credible. (Tr. 22-23.) At step four, relying on
19 the VE, the ALJ found plaintiff's RFC for a range of medium work
20 precludes him from performing his past relevant work as a janitor
21 and kitchen helper/dishwasher because both jobs require exposure
22 to chemicals. (Tr. 24-25, referring to Tr. 391.) At step five,
23 again relying on the VE, the ALJ found a person with plaintiff's
24 RFC and background could perform other jobs such as small parts
25 assembler, packer, and line worker. (Tr. 25, referring to Tr.
26 392-393.) Accordingly, the ALJ found that plaintiff is not
27 disabled as defined by the Social Security Act. (Tr. 26.)

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ISSUES

Plaintiff contends that the Commissioner erred as a matter of law by failing to (1) properly weigh the medical evidence, specifically the opinions of Drs. Clifford and Gardner; (2) include migraine headaches as a severe impairment; and (3) properly assess his credibility. (Ct. Rec. 15 at 14-19.) Plaintiff further alleges that new evidence submitted to the Appeals Council (John Arnold, Ph.D.'s 2007 opinions) requires remand. (Ct. Rec. 15 at 15-16.) The Commissioner responds that the ALJ appropriately weighed the evidence and the later report does not necessitate remand. The Commissioner asks the Court to affirm his decision. (Ct. Rec. 18 at 9). Plaintiff lists the date of the ALJ's decision as December 1, 2008 (Ct. Rec. 15 at 1), while the Commissioner indicates the date of the decision is December 1, 2006. (Ct. Rec. 18 at 2.) The court adopts the Appeals Council's reference to the ALJ's decision as December 1, 2006 (Tr. 6).

DISCUSSION**A. Weighing medical evidence**

In social security proceedings, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical evidence of an underlying impairment has been shown, medical findings are not required to support the

1 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
2 341, 345 (9th Cir. 1991).

3 A treating physician's opinion is given special weight
4 because of familiarity with the claimant and the claimant's
5 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
6 Cir. 1989). However, the treating physician's opinion is not
7 "necessarily conclusive as to either a physical condition or the
8 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
9 751 (9th Cir. 1989) (citations omitted). More weight is given to
10 a treating physician than an examining physician. *Lester v.*
11 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
12 weight is given to the opinions of treating and examining
13 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
14 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
15 physician's opinions are not contradicted, they can be rejected
16 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
17 If contradicted, the ALJ may reject an opinion if he states
18 specific, legitimate reasons that are supported by substantial
19 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
20 F. 3d 1435, 1463 (9th Cir. 1995).

21 In addition to the testimony of a nonexamining medical
22 advisor, the ALJ must have other evidence to support a decision to
23 reject the opinion of a treating physician, such as laboratory
24 test results, contrary reports from examining physicians, and
25 testimony from the claimant that was inconsistent with the
26 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
27 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
28 Cir. 1995).

1 Plaintiff contends that the ALJ failed to properly credit
2 the opinion of Gerald Gardner, Ph.D, that plaintiff suffers
3 moderate limitations and of Thomas Clifford, Ph.D., that he
4 suffers marked limitations. (Ct. Rec. 15 at 14-15.)

5 The ALJ considered the March 17, 2004, opinion of state
6 agency consultant Thomas Clifford, Ph.D. (Tr. 23, referring to Tr.
7 238-255):

8 On March 17, 2004, Dr. Thomas Clifford, Ph.D., opined
9 that the claimant suffered from Attention Deficit
10 Hyperactivity Disorder by history, depression, and
11 borderline intellectual functioning. Exhibit 7F. He
12 determined the claimant was mildly limited in his
13 activities of daily living; moderately limited in his
14 ability to maintain social functioning; mildly limited
15 in his ability to maintain concentration, persistence,
16 and pace; and there was insufficient evidence of
17 repeated episodes of decompensation. Due to [ADHD],
18 Dr. Clifford indicated the claimant was markedly
19 limited in his ability to understand and remember
20 detailed instructions, carry out detailed instructions,
21 and interact appropriately with the general public.
22 The claimant was not [otherwise] limited. . . The
23 undersigned fully considered this opinion, but finds
24 there is no evidence to support marked limitations,
25 especially given responses by the claimant's previous
26 employer on the Job Performance and Productivity
27 Questionnaire. Exhibit 3E.

28 (Tr. 23, referring to Exhibit 7F.)

The job performance questionnaire referred to by the ALJ (at
Tr. 72-73) indicates that from June 16, 2000, to December 26, 2003
(the latter roughly two months before onset), plaintiff's
attendance and punctuality were good, he met expectations of
performance standards, and was able to follow instructions. (Tr.
72.) His ability to work with regular supervision and
independently were good. He has a good working relationship with
his supervisor, but difficulty adjusting to new employees and at
times working with coworkers. (Tr. 72.) Other than new
coworkers, he was able to cope with changes in the work

1 environment. He met deadlines and had good decision-making skills
2 with respect to his job. He was given no special consideration in
3 performing his work. (Tr. 73.)

4 The ALJ's reason for rejecting the marked impairments
5 assessed by Dr. Clifford is specific, legitimate, and fully
6 supported by the evidence.

7 The ALJ considered the opinion of agency consultant Gerald
8 Gardner, Ph.D., dated December 11, 2004, about ten months after
9 onset. (Tr. 23, referring to Exhibit 11F.) The ALJ notes Dr.
10 Gardner diagnosed borderline intellectual functioning and ADHD,
11 well controlled. (Tr. 23, referring to Tr. 283, 286-287.) Dr.
12 Gardner asserted plaintiff is moderately limited in his ability to
13 understand, remember, and carry out detailed instructions,
14 interact appropriately with the general public, respond
15 appropriately to changes in the work setting, travel to unfamiliar
16 places or use public transportation, and set realistic goals or
17 make plans independently of others. (Tr. 297, 299.)

18 The ALJ points out that Dr. Gardner's functional capacity
19 assessment indicates plaintiff can understand and remember simple
20 instructions and procedures, make simple adjustments to change,
21 and carry out a routine commute. (Tr. 23-24, referring to Tr.
22 299.) The ALJ was persuaded by and incorporated Dr. Gardner's
23 narrative limitations when he assessed plaintiff's RFC.

24 The ALJ considered the March 1, 2004 (about two weeks post-
25 onset), opinion of evaluating psychologist Thomas McKnight, Ph.D.
26 (Tr. 232-237.) (Tr. 20, 22, 24.) Dr. McKnight assessed a GAF of
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1 65¹. (Tr. 237.) He opined plaintiff did not have a cognitive or

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4 A Global Assessment of Functioning (GAF) of 65 indicates some
5 mild symptoms (e.g., depressed mood and mild insomnia) or some
6 difficulty in social, occupational or school functioning (e.g.,
7 occasional truancy, or theft within the household), but
generally functioning pretty well, has some meaningful
interpersonal relationships. DIAGNOSTIC AND STATISTICAL MANUAL
OF MENTAL DISORDERS FOURTH EDITION (DSM-IV), at p. 32.

1 psychological factor that precluded him from full-time gainful
2 employment. (Tr. 237.) The ALJ also notes Dr. McKnight
3 accurately observed plaintiff's ADD symptoms existed during the
4 three and a half years plaintiff was employed. (Tr. 24, referring
5 to Exhibit 6F at 6.) The ALJ points out that he (the ALJ) could
6 find no evidence in the medical record that plaintiff's condition
7 worsened since Dr. McKnight's March 1, 2004 opinion. (Tr. 24.)

8 The ALJ considered the December 2, 2004 (about ten months
9 post-onset) opinion of evaluating psychologist L. Robert Capes,
10 Psy. D. (Tr. 22-24.) Dr. Capes echoed Dr. McKnight's conclusion
11 that plaintiff's mental impairments of ADD, controlled through
12 medication, and alleged PTSD are not barriers to employment. (Tr.
13 24, referring to Exhibit 9F at Tr. 277.) Dr. Capes assessed
14 borderline intellectual functioning and similarly assessed a GAF
15 of 65. (Tr. 277.)

16 To further aid in weighing the conflicting medical evidence,
17 the ALJ evaluated plaintiff's credibility and found him less than
18 fully credible. (Tr. 22-23.) Credibility determinations bear on
19 evaluations of medical evidence when an ALJ is presented with
20 conflicting medical opinions or inconsistency between a claimant's
21 subjective complaints and diagnosed condition. *See Webb v.*
22 *Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

23 It is the province of the ALJ to make credibility
24 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
25 1995). However, the ALJ's findings must be supported by specific
26 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
27 Cir. 1990). Once the claimant produces medical evidence of an

1 underlying medical impairment, the ALJ may not discredit testimony
2 as to the severity of an impairment because it is unsupported by
3 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
4 1998). Absent affirmative evidence of malingering, the ALJ's
5 reasons for rejecting the claimant's testimony must be "clear and
6 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
7 "General findings are insufficient: rather the ALJ must identify
8 what testimony not credible and what evidence undermines the
9 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
10 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

11 The ALJ relied on several factors when he assessed
12 credibility: objective medical findings do not support the degree
13 of impairment claimed; inconsistent statements; failure to follow
14 recommended courses of treatment, and activities inconsistent with
15 the degree of impairment alleged. (Tr. 22-23.) As the ALJ
16 concludes, medical reports indicate plaintiff is capable of
17 performing a full range of daily activities, and there is no
18 medical reason for plaintiff's daily activities to be as
19 restricted as he alleged at the hearing. (Tr. 22.)

20 Plaintiff's testimony that he needs daily naps is unsupported
21 by objective evidence. (Tr. 22.) There is nothing in the reports
22 of Drs. McKnight or Capes (or anywhere else) indicating a need to
23 take naps. Instead, plaintiff reported to both psychologists an
24 extensive range of daily activities, including cooking, washing
25 dishes, laundry, cleaning, shopping, eating out weekly, playing
26 computer games and going to casinos. (Tr. 22, referring to
27 Exhibits 6F at 4 and 9F at 4.) Inconsistent statements include
28 plaintiff telling Jay Toews, Ed. D., in 1998 that he was raised in

1 a group home (Tr. 221), while he told Dr. McKnight in 2004 he was
2 raised by his mother and her parents. (Tr. 234.)

3 Plaintiff failed to follow medical recommendations to stop
4 smoking to avoid lung problems, including bronchitis (Tr. 261,
5 265). He failed to take seligiline for headaches as prescribed,
6 allegedly due to lack of funds, causing increased symptoms. (Tr.
7 279.)

8 Additional activities which diminish plaintiff's claim of
9 disabling impairment include fishing (July 11, 2004 at Tr. 87);
10 lawn mowing (November 9, 2004 at Tr. 131); hunting, bowling,
11 hiking and skiing (December 2, 2004 at Tr. 274), and, more
12 recently, fishing (May 8, 2006 at Tr. 358), all of which would
13 seem inconsistent with disabling arthritis or other severe
14 physical disability such as plaintiff's testimony described.

15 The ALJ's reasons for finding plaintiff less than fully
16 credible are clear, convincing, and fully supported by the record.
17 *See Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
18 2002)(proper factors include inconsistencies in plaintiff's
19 statements, inconsistencies between statements and conduct, and
20 extent of daily activities). Noncompliance with medical care or
21 unexplained or inadequately explained reasons for failing to seek
22 medical treatment also cast doubt on a claimant's subjective
23 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.
24 2d 597, 603 (9th Cir. 1989).

25 To the extent the ALJ rejected the contradicted opinions of
26 some of the professionals, his reasons are legitimate, specific,
27 and supported by substantial evidence in the record. *See Lester*
28 *v. Chater*, 81 F. 3d 821, 830-831 (9th Cir. 1995)(holding that the

1 ALJ must make findings setting forth specific, legitimate reasons
2 for rejecting the treating physician's contradicted opinion).

3 The ALJ is responsible for reviewing the evidence and
4 resolving conflicts or ambiguities in testimony. *Magallanes v.*
5 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
6 trier of fact, not this court, to resolve conflicts in evidence.
7 *Richardson*, 402 U.S. at 400. The court has a limited role in
8 determining whether the ALJ's decision is supported by substantial
9 evidence and may not substitute its own judgment for that of the
10 ALJ, even if it might justifiably have reached a different result
11 upon de novo review. 42 U.S.C. § 405 (g).

12 There is no error in the ALJ's assessment of the evidence and
13 RFC determination.

14 **B. Step two**

15 Plaintiff alleges the ALJ erred at step two by failing to
16 find headaches a severe impairment, and by discounting plaintiff's
17 testimony with respect to hand tremors making gripping objects
18 impossible. (Ct. Rec. 15 at 16-19.)

19 The ALJ considered the evidence related to headaches. (Tr.
20 20, referring to Exhibits 8F at 4 and 10F at 1.) When he gets a
21 headache (about twice a month for 2 hours each time), plaintiff
22 takes prescription medication and aspirin and goes to bed. The
23 medication helps. The ALJ notes there are no clinical test
24 results in the record showing the cause of the headaches. They
25 appear well controlled with medication and last only a short time.
26 (Tr. 20.) The ALJ's finding that this is not a severe impairment
27 is supported by the record.

28 The undersigned has reviewed plaintiff's claims of disabling

1 tremors and restless leg syndrome, as urged by plaintiff. The
2 ALJ's credibility determination and weighing of the medical
3 evidence in this respect is also without error.

4 **C. Appeals Council evidence**

5 Plaintiff argues remand is warranted to consider evidence
6 received by the Appeals Council after the ALJ's decision. The
7 evidence includes reports by John Arnold, Ph. D., dated June 1,
8 2007 (Tr. 369-372), June 18, 2007 (Tr. 365-368, and September 5,
9 2007 (Tr. 363-364).

10 The court agrees with the Commissioner that plaintiff fails
11 to show good cause for failing to produce the opinions earlier,
12 i.e., prior to the hearing so that the ALJ could consider them.
13 In addition, Dr. Arnold's opinion appears both provisional, in
14 that he recommended plaintiff undergo a psychiatric examination
15 (Tr. 368), and contradictory, in that he opined plaintiff met
16 Listing 12.08 due to borderline personality symptoms (Tr. 363).

17 The ALJ's assessment of the medical evidence and of
18 plaintiff's credibility are supported by the record and free of
19 legal error. The evidence submitted to the Appeals Council after
20 the hearing does not change the court's opinion that the ALJ's
21 conclusions are free of error, fully supported by the evidence,
22 and would not have resulted in a different outcome even if timely
23 submitted.

24 **CONCLUSION**

25 Having reviewed the record and the ALJ's conclusions, this
26 court finds that the ALJ's decision is free of legal error and
27 supported by substantial evidence..

28 **IT IS ORDERED:**

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

1 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
2 **GRANTED.**

3 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
4 **DENIED.**

5 The District Court Executive is directed to file this Order,
6 provide copies to counsel for Plaintiff and Defendant, enter
7 judgment in favor of Defendant, and **CLOSE** this file.

8 DATED this 6th day of April, 2009.

9 s/ James P. Hutton
10 JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE